2000

Don K. Fullmer, Carma M. Fullmer, Dean Fullmer v. Ethel W. Blood : Brief of Respondent

Utah Supreme Court

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Atkin, Allen and Thompson; Frank A. Allen; Attorney for Respondent.

IN THE SUPREME COURT OF THE

STATE OF UTAH

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DON K. FULLMER, CARMA M. FULLMER, and DEAN FULLMER,

Plaintiffs,

vs.

ETHEL W. BLOOD,

Defendant.

14082

Case No. ~~4843~~

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BRIEF OF RESPONDENT

Dean Fullmer

APPEAL FROM JUDGMENT

of the

DISTRICT COURT OF THE FIFTH
JUDICIAL DISTRICT IN AND FOR WASHINGTON
COUNTY, STATE OF UTAH
Honorable J. Harlan Burns
Judge

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IN THE SUPREME COURT OF THE

STATE OF UTAH

DON K. FULLMER, CARMA M. FULLMER, and DEAN FULLMER,

Plaintiffs-Respondent,

vs.

ETHEL W. BLOOD,

Defendant-Appellant.

Case No. 14082

BRIEF OF RESPONDENT

NATURE OF THE CASE

Plaintiffs brought this action for a decree quieting title in their favor and against defendant, Ethel W. Blood, in certain real property near Hurricane, Utah, and for an order delcaring that defendant, Ethel W. Blood, has no interest in and to said real property pursuant to a certain uniform real estate contract, to which the plaintiffs were parties.

DISPOSITION IN LOWER COURT

The District Court for the Fifth Judicial District in and for the County of Washington, the Honorable J. Harlan Burns presiding, entered its judgment declaring that Ethel W. Blood has no right, title or interest in the disputed property, that plaintiff, Dean Fullmer, is the sole owner in fee simple of the property, quieting title of Dean Fullmer as against defendant and the other plaintiffs, and

ordering that all sums paid by defendant or her predecessors pursuant to the uniform real estate contract be forfeited as liquidated damages, and denying the plaintiffs' request for a reasonable attorney's fee.

RELIEF SOUGHT ON APPEAL

Plaintiff requests that this Court affirm the judgment of the trial court, with the exception that this Court reverse that portion of the judgment rendered by the trial court denying plaintiff a reasonable attorney's fee, and that this Court award to the plaintiff as a reasonable attorney's fee the amount testified to in the trail court.

STATEMENT OF FACTS

February 14, 1969, the plaintiff, Don K. Fullmer, and Mr. Keith W. Naylor purchased real property near Hurricane, Utah, from Winferd and Mona Spendlove on a uniform real estate contract. The purchase price of $47,817.00 was payable in ten equal annual installments after a down payment of $6,000.00 and $6,000.00 payable May 16, 1969, together with interest on the principal at six percent (6%) per annum. On the date of purchase and until August 29, 1970, the buyers were equal partners in a California partnership doing business as Cal-Horizons Products and Imperial Products. On this latter date, Mr. Naylor and his wife purchased all of Don K. Fullmer and his wife's interest in the partnership. Note the Appellant's brief erroneously states that Mr. Naylor and his wife purchased all of Dean Fullmer's and his wife's interest in the partnership, see R.161.

Mr. Naylor failed to pay Mr. Don K. Fullmer for the purchase of this partnership interest and on December 26, 1971, Mr. Don K. Fullmer and his wife obtained a judgment against the Naylors in California for the balance due from the sale of said partnership interest. They then sued on the California judgment in Washington County, Utah, and on April 28, 1972, obtained a Summary Judgment against the Naylors. The Fullmers, unaware that Mr. Naylor had assigned all of his interest in the uniform real estate contract in question to a Ethel W. Blood, purchased the Naylors interest in the subject property at a Sheriff's sale.

Mrs. Blood's attorney then notified the Fullmers of the assignment which had taken place on September 22, 1970, after the purchase by Mr. Naylor of his partner's interest in aforesaid partnership and prior to Fullmers' judgment against Mr. Naylor. It should be emphasized that Mrs. Blood is the mother-in-law of Mr. Naylor. The plaintiff alleged in its Amended Complaint that Mr. Naylor was insolvent on the date of the alleged assignment. In any event, in consideration of the assignment of property for which the partnership had on that date paid the sum of $12,000, Mrs. Blood extinguished a $2,500 debt owed to her by Mr. Naylor and after execution of said assignment made the 1970 annual payment of $5,800 on the subject property. This was the only sum which Mrs. Blood paid on the subject property from that date to the present.

March 9, 1974 Winferd and Mona A. Spendlove assigned their interest, as seller, in the uniform real estate contract in question to Dean Fullmer, brother of Don K. Fullmer. Annual payments for the years 1971, 1972 and 1973 had not been made. On

March 26, 1974, Dean Fullmer sent a certified demand letter to Mrs. Blood stating unless a buyer's deficiency in the amount of $5,367.35 (the amount of the 1973 annual payment) was made within five days from the date of Mrs. Blood's receipt of the letter all her interest would be forfeited and all of his obligations to her would be terminated as provided in paragraph 16A of the uniform real estate contract.

The defendant received this letter on April 1, 1974, not May 1, 1974, as set forth in appellant's brief (R.118). Twelve days later on April 12, 1974, Mrs. Blood, having failed to contract Dean Fullmer personally or through her attorney, was advised by letter that pursuant to paragraph 16A of the uniform real estate contract all sums paid by her had been forfeited.

Since Mrs. Blood failed to respond to the written demands of Dean Fullmer on May 7, 1974, the plaintiffs moved to amend their complaint to add Mr. Dean Fullmer as a party plaintiff and to allege an additional cause of action against Mrs. Blood for failure to comply with the terms of the uniform real estate contract. This motion was granted.

On June 5, 1974, Mrs. Blood's counsel personally handed plaintiffs' counsel a written tender dated June 4, 1974, of the amount demanded April 1, 1974, without funds enclosed (R. 162). The following day this tender was rejected on the grounds that it was made approximately 60 days after the defendant had been notified in writing that her interest had been forfeited and was therefore untimely.

A copy of the trial court's order setting the matter for trial on September 5, 1974, was mailed to Defendant's counsel in

St. George from Cedar City, Utah, on August 23, 1974. Appellant's brief is silent as to when defendant's counsel received the court's order, stating only that six days later on August 30 (Friday) a copy of the order was mailed to the defendant. Apparently, defense counsel's only other attempt to communicate with his client was a telephone call to her the day before the trial on September 4, 1974.

Contrary to appellant's statement of fact, there is no evidence in the Supplemental Record of any witnesses testifying for the defense who were not and could not have been present on that date. Defendant's counsel moved for a continuance, if possible because his client was not present. The defendant's counsel then admits that the testimony of Mrs. Blood could be stipulated (S.R.G. 2). A recess of three hours then ensued during which time counsel discussed the stipulation of testimony in detail and the matter was recalled and proceeded as indicated in the Supplemental Record. The request of Defendant's counsel for a continuance was never renewed. It can only be assumed that this is due to the fact that the testimony which counsel believed to be critical to her case was stipulated to in the record.

ARGUMENT

I

THE TRIAL COURT RULED CORRECTLY IN ENTERING ITS JUDGMENT FORFEITING DEFENDANT BLOOD'S INTEREST IN THE UNIFORM REAL ESTATE CONTRACT.

A. <u>The Circumstances that Existed at the Time Plaintiffs</u>

gave Notice of Their Intention to Declare Forfeiture did not Excuse Defendant from Prompt Compliance with Plaintiffs' Demands.

The defendant now realizes that the stipulations as to the facts in this matter resulted in a judgment being rendered against the defendant. Furthermore, the defendant admits that a motion for relief from a stipulation is appropriately made to the trial court. In this case, no such motion was made. Having failed to do so, appellant asks the Supreme Court to in effect grant the appellant a new trial so that shemay raise new issues and present evidence in support thereof. Finally, defendant does not deny the efficacy or conclusiveness of her stipulation but argues that the stipulation should be set aside because of the injustice to defendant arising from it.

Appellant correctly states that all preconditions to the exercise of the options available to the seller upon the purchaser's default under a uniform real estate contract must be strictly complied with. The respondent has complied with all the pre-requisites to forfeiture as set forth in the Utah Supreme Court cases of LaMont v. Evjen, 29 Utah 2d 266, 508 P.2d 532 (1973) and Romero v. Schmidt, 15 Utah 2d 300, 392 P.2d 37 (1964). Applying these holdings to the instant case, on March 27, 1974, by certified letter, received by Ethel Blood on April 1, 1974, she was advised of her default in the annual payment due May 1973. She was further advised that she had five days to cure this default. Twelve days later, receiving no tender or other communication from Mrs. Blood, Dean Fullmer again advised Mrs. Blood in writing that a default had occurred.

Respondent knows of no Utah Supreme Court case holding the five day requirement in the standard uniform real estate contract unreasonable. Nor, did defendant's counsel argue at any time prior to appeal that five days was unreasonable. In this case, the parties contractually agreed on the five day time period and further agreed that time was of the essence in their agreement. The facts of the case before the court are clearly distinguishable from Romero v. Schmidt, ibid, since in that case the seller was required to perform an affirmative act, i.e., provide an accounting of the balance due which he failed to do. Furthermore, in that case, the buyer made tender before the seller exercised his option to declare the whole debt due. In this case the tender was clearly made after the seller had exercised his option.

The appellant attempts to create unreasonable behavior on the part of the plaintiff to preclude his resort to the remedies afforded him under the contract. This court must keep in mind that to construct this unreasonable behavior, the appellant quotes extensively from pleadings filed May 7, 1974, to the date of trial and argues from this as to the conduct and more importantly subjective intent of the parties in March and April, 1974.

The amended complaint was filed on June 14, 1974. The amended complaint was the first pleading filed that indicated that Don K. and Carma Fullmer had assigned their interest in the contract in question to Dean Fullmer on September 12, 1973. This document is unrecorded (R.39). Mrs. Blood never alleged knowledged of this assignment in March of 1974. The issue of co-tenancy arising out of this assignment was first argued by defendant's counsel in a

memorandum of points and authorities dated July 10, 1974, (R. 95).

Respondent takes exception to the inference that prior to forfeiture of her interest Mrs. Blood knew of the assignment or understood that Dean Fullmer owned both a buyer's and a seller's interest. The record before this Court does not indicate that it was obvious to Mrs. Blood in March and April of 1974 that Dean Fullmer occupied both the seller's and buyer's interest under the contract. Dean Fullmer never advised or asserted to Mrs. Blood that he owned a buyer's interest in the uniform real estate contract in question, and never asserted the one-half buyer's interest in the property pursuant to the contract by virtue of the assignment. There is no evidence in the record to indicate that in March or April of 1974 Mrs. Blood believed that Dean Fullmer had a buyer's interest in the property in question. There is no evidence that at the time of forfeiture Dean Fullmer did anything to confuse Mrs. Blood. There is no question that the court was concerned whether or not Dean Fullmer and Ethel Blood were co-tenants (R. 92), but this only became an issue after the pleadings were framed in the law suit. This occurred several months after the forfeiture of defendant's interest in the contract in question.

In reviewing the evidence in preparation for trial after August 22, 1974, plaintiffs' counsel first became aware of the sale of the partnership assets to Mr. and Mrs. Naylor in the year 1970. On the day prior to the trial, a conference was held between the respective counsel for the parties and after reviewing the evidence, defendant's counsel stipulated that the property in question was partnership property having been purchased with partner-

ship funds. A written copy of this stipulation was executed by counsel and presented to the court on the day of the trial, September 5, 1975, (S.R.G. 2). For some unknown reason this stipulation does not appear in the record, but is set forth as Appendix A in appellant's brief. The stipulation replaced superfluous facts which had preoccupied all parties and the trial court's attention after Mrs. Blood's interest had been forfeited.

The conclusions reached by the trial court were based on the facts as they were admitted to by all parties. The appellant would request that the court disregard this stipulation and reverse the trial court's decision, based upon the circumstances under which the parties thought they were proceeding. The fallacy in this lies in the fact that there is absolutely no evidence in the record before the Supreme Court from which it might ascertain what the subjective belief and intent of the parties was between March 26, 1974, and June 4, 1974.

Respondent has strenuously argued from the date the issue was first raised by defendant's counsel that Dean Fullmer was not a co-tenant of Mrs. Blood. For the sake of argument, even assuming that the parties were co-tenants, the general rule of inurement set forth by the appellant in Heiselt v. Heiselt, 10 Utah 2d 126, 349 P.2d 175 (1960) is inapplicable where the co-tenants' interests accrue at different times, by different instruments and by different persons where neither party has superior knowledge respecting the state of title and where neither party employs his co-tenancy to secure an advantage. 54 A.L.R. 886. The majority view holds that the general rule of inurement between co-tenants

is inapplicable where there is in fact no confidential relationship between cotenants. 20 Am. Jur. 2d, Cotenancy and Joint Ownership, §70, p.168.

Here there was no evidence presented of a fiduciary relationship between the parties. A trustee relationship is not presumed simply because of the cotenancy relationship, see Hodgson v. Federal Oils' Development Co., 54 A.L.R. 874 (1927). It is undisputed that Dean Fullmer and Ethel Blood acquired any cotenancy interest to which they may have visa each other from different grantors, by different instruments, at different times.

B. The Evidence Fails to Show that the Parties Intended that the Land or Interest in the Contract was not Partnership Property.

Defendant's counsel stipulated in writing that the property in question in this law suit was purchased out of partnership funds. From this the trial court concluded that the property in question was partnership property (R. 161). Property which is paid for with partnership funds is prima facia the property of the partnership, although the title is taken in the individual name of one or more of the partners. Deming v. Moss, 40 Utah 501, 121 p.971, 1912.

Appellant accuses the trial court of overlooking the fact that the presumption is defeated by showing contrary intent. Appellant argues that the pleadings are repleat with evidence which rebut the presumption that property purchased with partnership funds is partnership property. This argument ignores the fact that defendant's counsel, at trial, presented absolutely no

evidence to the trier of fact of any contrary intention to rebut this presumption. The reason is clear, defendant's counsel had conceded that the property in question was partnership property.

The fact that Dean Fullmer made statements which were inconsistant with this is easily explained by the fact that Mr. Fullmer was unaware of the purchase of his brother's interest by Mr. and Mrs. Naylor and of the consequences of this purchase. Furthermore, this evidence was not made available to plaintiffs' counsel until several days prior to the date of trial.

As the Supreme Court is also aware, the pleadings which are extensively quoted by appellant are not evidence. Nevertheless, the issues raised by the stipulation and consent of the parties shall be treated as if they were raised in the pleadings and supplant and supersede the issues raised in the pleadings which they negate. Rule 15(b) Utah Rules of Civil Procedure. In the absence of any evidence presented to the trial court at the trial of the above matter to rebut the fact that property purchased with partnership funds is partnership property, the trial court correctly overlooked statements in the pleadings to the contrary. Appellant asks the Supreme Court to reverse the judgment of the trial court so that he can present evidence on an issue which he failed to raise or present evidence on at the trial court level. In effect, appellant seeks reversal, not because or error by the trial court, but due to his own omission. The judgment of the trial court should be affirmed.

II

THE TRIAL COURT WAS CORRECT IN FORFEITING THE SUMS PAID BY DEFENDANT AS LIQUIDATED DAMAGES.

Appellant erroneously states that $17,844.79 was forfeited by Mrs. Blood. Defendant's counsel stipulated that the defendant and her predecessor's interest had paid in total $12,156.00 on the contract in question (S.R.G. 5), not $17,844.79. Plaintiffs' counsel accepted this verbal stipulation made at trial, even though the evidence indicated Mrs. Blood cancelled a $2,500.00 debt and paid one payment of $5,800.00 for a total investment in the property of $8,300.00. It should be pointed out to the Court that the stipulated figure did not include the $5,367.35 belatedly tendered by the defendant, since this amount of money was never accepted by the plaintiff.

The appellant computes the forfeiture to be over 37% of the purchase price. This percentage is grossly overstated. It was computed by dividing $17,844.79 (alleged payments) by $47,817.00 (alleged total contract price). Note that the $17,844.79 figure used by the appellant includes interest, while the $47,817.00 figure does not. The contract bears interest at the rate of six percent (6%) per annum (R. 63). The total interest computed on the unpaid balance over the life of the contract amounts to $11,819.00, and the total contract price is $59,636.00.

Dividing the principal and interest actually paid by the defendant or her predecessor's interest, as stipulated, $12,156.00 by the total principal and interest on the contract $59,636.00, the payments made by the defendant represent twenty percent 20% of the purchase price and not thirty-seven percent 37%.

As a general rule "the law permits a person to make a contract which will result in the forfeiture; and when it is clear from the terms of the contract that the parties have so agreed, a court of law as well as a court of equity will enforce the forfeiture," 17 Am. Jur. 2d, Contracts, §499 at 974.

In Inglestrom v. Bushnell, 20 Utah 2d 250, 436 P.2d 806 (1968), the Supreme Court affirmed the right of a seller under a uniform real estate contract to retain the down payment as a forfeiture for the buyer's non-performance. In Jensen v. Neilsen 26 Utah 2d 96, 485 P.2d 673, 674, 675 (1971), the Court formulates a prerequisite for refusal to enforce a forfeiture. "[T] the circumstances must be such that if the forfeiture were applied, it would be so grossly excessive in relation to any realistic view of the loss that might have been contemplated by the parties, that if it would so shock the conscience that a court of equity would refuse to enforce such forfeiture."

> The Court sites with approval Jacobson v. Swan, 3 Utah 2d 59, 278 P.2d 294, which states that the court will only interfere with the parties contractual right to provide for a forfeiture, "when forfeiture would be so grossly excessive as to be entirely disproportionate to any possible loss...."

These citations make it clear that the appellant has the burden of showing that the trial court erred in not finding the forfeitures so grossly excessive as to be entirely disproportionate to any possible loss. The burden of proof on this issue vested with defendant and the defendant presented no evidence whatsoever on this issue at trial. Defendant's counsel never argued to the trial court that the forfeiture of the amount stipulated as payment by the defendant was so grossly excessive as to be entirely dispropor-

tionate to any possible loss. With no contrary evidence before trier of fact, he properly concluded that the twenty percent (20%) forfeiture in this case was not unconscionable. Evidence is the grist of the mill of justice, without it the court cannot act. Appellant seeks reversal so he may present evidence again that he omitted to present at trial. Nevertheless, this court has considered the fair rental value of the property during the period of occupancy as the primary factor to be considered in approximating the damage suffered by the seller. Cole v. Parker, 5 Utah 2d, 263, 300 P.2d 623 (1956). The defendant has had the right to possession of the 37 acres of farm property in question for approximately four years. Dividing the total payments made by the defendant of $12,156.00 by this time period amounts to an annual rental of $3,039.00 or approximately $82.00 per acre per year. This by itself is clearly not so grossly excessive as to be entirely disproportionate to any possible contemplated loss.

Furthermore, in this case the plaintiffs made payments on the subject property in the years 1971 and 1972 to avoid a forfeiture by the original seller. They approximate the sum paid by the defendant and in affect the forfeiture reimburses him for these payments. When these factors are weighed against the $12,156.00 lost by the forfeiture, coupled with the fact that the defendants have presented no evidence that the forfeiture was unconscionable, nor prior to this appeal made any argument to that affect, the trial court's determination that the loss was not unconscionable should be upheld.

III

THE TRIAL COURT INCORRECTLY DISALLOWED PLAINTIFFS' CLAIM FOR ATTORNEY'S FEE.

The instant action arose out of a breach of a uniform real estate contract by the defendant. This contract specifically provides that "should either party default in any of the covenants or agreements contained therein, the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from forcing the agreement, or in obtaining possession of the premises covered thereby" (R. 64). This is the basis of plaintiffs' claim to attorney's fees. Hawkins v. Parry, 123 Utah 16, 253 P.2d 372.

The plaintiffs not only pled their entitlement to attorney's fees, but at the trial presented evidence as to the reasonableness of the $2,106.00 attorney's fee incurred (S.R.G.). Certainly the determination of whether the plaintiffs have met their burden on this issue is within the sound discretion of the trial court, see, e.g., First Security Bank of Utah, N.A. v. Wright, 521 P.2d 563 (1974).

The trial court found the defendant in total breach of her contract with the plaintiffs (R. 163). The contract between the parties provided that in such event the defendant shall pay a reasonable attorney's fee. The plaintiffs presented their evidence as to the reasonableness of the attorney's fees requested. There was no cross examination or rebutal testamony. Appellant admits that the factors involved in determing the amount of attorney's fees are favorable to plaintiffs. Appellant argues from this that

because plaintiffs were successful, defendant should be relieved from her contractual obligation to pay plaintiffs' attorney's fees, even though the acts of the defendant necessitated the attorney's fees incurred by plaintiffs. This argument defies logic and the absence of authority in appellant's brief in support of this proposition should be noted.

The trial court did not direct any questions to the plaintiffs as to the necessity or reasonableness of the attorney's fee requested. The necessity of plaintiffs incurring attorney's fees is easily supported by a review of the Transcript of Record. Defendant raised numerous issues which required substantial research and lengthy memorandums by plaintiffs' counsel. Reviewing plaintiffs' testimony on the issue and in the absence of any contrary testimony at all, the trial court's refusal to allow attorney's fees can only be held to be arbitrary and an abuse of discretion. Furthermore, the trial court has failed to state in the record, or otherwise, the basis for its failure to award attorney's fees. This is emphasized by the purely speculative arguments raised by appellant as to why the court ruled as it did (appellant's brief, page 29). There is no basis in the record to determine why the trial court ruled as it did. This amounted to an abuse of discretion by the trial court and should be reversed.

CONCLUSION

The judgment below properly rests on the evidence presented to the trier of fact at the trial. The appellant seeks reversal on the grounds that circumstnaces existed which excuse

appellant's prompt compliance. These "circumstances" were not presented as evidence to the trier of fact at the trial. There was no assertion that plaintiffs had both a buyer's and seller's interest in the contract until after the forfeiture had occurred. There was absolutely no evidence at trial, nor is there in appellant's brief as to Mrs. Blood's perception of the circumstances at the time of forfeiture (March 26, 1974, to April 12, 1974).

Furthermore, there was no evidence presented at trial to defeat the presumption that the property in question was partnership property. Pleadings simply are not evidence. Neither was there any evidence that the forfeiture of monies paid by Mrs. Blood was disproportionate to any contemplated loss.

Appellant seeks reversal to present defenses and evidence which were omitted by counsel at the trial. Appellant's position is that the trial court committed error by not considering the pleadings as evidence and not ruling in appellant's favor on issues which may have been raised in the pleadings but on which appellant failed to present evidence at trial. Therefore, the Supreme Court should affirm the decision of trial court, except as to failure to award plaintiffs their attorney's fees which should be reversed, awarding respondent $2,106.00.

Respectfully Submitted,

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